**U.S. Department of Labor**

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**Issue Date: 02 March 2005**

**CASE NOS.: 2004-LHC-982**
**2004-LHC-983**

**OWCP NOS.: 07-159231**
**07-160883**

**IN THE MATTER OF:**

**HENRY L. OWENS,**

**Claimant**

**v.**

**AVONDALE INDUSTRIES, INC.,**

**Employer**

APPEARANCES:

TOMMY DULIN, ESQ.

For The Claimant

PAUL F. HOWELL, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

**DECISION AND ORDER**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Henry L. Owens (Claimant) against Avondale Industries, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for a hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing for August 13, 2004, in Gulfport, Mississippi. All parties were

afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 18 exhibits and Employer proffered 32 exhibits. All exhibits, without objection, were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and Employer on October 4, 2004. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

## I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. Claimant was injured on January 29, 2001 and July 23, 2001.

2. Claimant's injuries occurred during the course and scope of his employment with Employer.

3. There existed an employee-employer relationship at the time of the injuries.

4. Employer was notified of the first injury on January 30, 2001 and was notified of the second injury on July 23, 2001.

5. Employer filed a Notice of Controversion for the first injury on February 21, 2001 and on January 9, 2002 for the second injury.

6. Informal conferences before the District Director were held on August 15, 2003 and September 3, 2003.

7. For the January 29, 2001 injury, Claimant received temporary total disability benefits from February 2, 2001 through February 5, 2001 at a compensation rate of $ 361.67 for the 4 days. Claimant also received temporary total disability benefits from March 27, 2001 through June 14, 2001 at the same compensation rate.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.____ ; Claimant's Exhibits: CX-___; Employer Exhibits: EX-___; and Joint Exhibit: JX-___.

8. For the July 23, 2001 injury, Claimant received temporary total disability benefits from July 24, 2001 through March 11, 2002 at a compensation rate of $419.77 for 33 weeks. Claimant also received temporary total disability benefits from November 20, 2002 through December 17, 2002 and September 13, 2003 through October 1, 2003 at the same compensation rate.

9. Claimant's average weekly wage at the time of the first injury was $542.49.

10. Claimant's average weekly wage at the time of the second injury was $629.63.

11. All medical bills have been paid pursuant to Section 7 of the Act.

12. Claimant has no permanent disability.

13. Claimant reached maximum medical improvement for his first injury on June 14, 2001.

14. Claimant reached maximum medical improvement for his second injury on March 8, 2002.

## II. ISSUES

The unresolved issues presented by the parties are:

1. Compensation for 17 days lost wages.

2. Nature and Extent of Disability.

3. Choice of physician.

4. Attorney's fees and interest.

At the formal hearing, the record consisted of the testimony of Claimant, Charles Dupree, and Michael Wheat, along with exhibits submitted by the respective parties.

## III. STATEMENT OF THE CASE

### The Testimonial Evidence

### Claimant

Claimant was born on December 3, 1956 and was 47 at the time of formal hearing. He has been married for eight years and has adult children. He completed the ninth-grade of formal

education. He attended Gulf Coast Tech Training Center for technical training in welding. He also attended CDI Truck Driving Training and obtained a commercial driver's license in December 2001. His commercial driver's license is for over-the-road truck driving, but he has never driven over-the-road. (EX-28, p. 3; Tr. 28-29).

Claimant's work experience includes various types of odd jobs, including "restaurants, janitorial, [steel] factory, nursing home, department of the City of St. Louis" in the Beautification Department cutting grass and picking up trash. He originally worked for Employer as a laminator and in the maintenance department, but his work was phased out and he left Employer to work for Redman Homes as a production worker in the "Shell" department. He measured, cut and fit sheets of sheetrock. Claimant returned to work for Employer in 1995 as a welder. Prior to his on-the-job injuries, Claimant received two work-related warnings. He testified the first was for improper welding and the other was an accusation of operating a cherry picker. (EX-28, p. 12-14; Tr. 29-31).

He had a prior workers' compensation case while working at Redman Homes when he stepped on a pile of sheetrock and injured his groin. All problems resulting from that accident have resolved. (Tr. 31-32).

Claimant had a personal injury lawsuit against S.G. Adams in 1987 due to a lifting injury with a bad sprain. He received three therapy treatments and was subsequently fired. He did not have any surgery because of this accident and all problems due to this accident have resolved as well. (Tr. 32-33).

Claimant never underwent a pre-employment physical prior to working for Employer. He passed a drug screen and has never failed one while working for Employer. Claimant's current position with Employer is as a first-class welder. At the time of formal hearing, Claimant worked on "LPD" vessels. (Tr. 33-34).

On January 29, 2001, Claimant worked the night shift in a confined space "gouged out from the day shift." He cleaned it out which required him to repeatedly bend, twist and weld in an eight-hour period. The bending and twisting in the confined space caused Claimant to injure himself. After injuring himself, Claimant completed the eight-hour shift, but was unable to return to work the next day. (Tr. 34-35; EX-28, pp. 17-19).

Claimant began medical treatment the following day with Dr. Hull at Primary Care. Employer's medical staff sent Claimant to

Dr. Hull. Claimant did not choose Dr. Hull. Dr. Hull prescribed medication and sent him to physical therapy. Claimant complained to Dr. Hull of "intense low back pain." Claimant denied the treatment was helpful. (Tr. 35-36).

Dr. Hull referred Claimant to Dr. Terry Smith. Claimant testified he did not choose Dr. Smith. In addition, Claimant maintained no one asked him to choose a doctor. Following Claimant's first injury, Dr. Smith provided him with a prescription for acupuncture and other alternative treatments, including lumbar traction. Claimant received lumbar traction and admitted it "relieved the pain somewhat." (Tr. 36).

Claimant returned to work, in April 2001, for Employer performing "flat welding" which is different from his former job. Before his injury, Claimant was "[w]elding clips, collars, inserts, flat welding, overhead" and grinding. Flat welding does not require twisting or bending, it just required Claimant to sit at a deck and weld. He testified he was "still having complications with [his] back, but trying to work the best [he] can." He received the same hourly pay as before his injury, but was not working the same number of hours. (Tr. 37-38; EX-28, p. 24).

On July 23, 2001, Claimant was injured while welding frames. He was "pulling [machine line cables] from one unit to another unit, and tripped over something and landed on [his] buttocks." Claimant believed he tripped over tracks in the concrete. He testified he experienced "excruciating pain" in his lower back after the second injury. He stopped working and sought medical attention at the medical facility on site at the job. (Tr. 38-40).

Employer sent him to Gulf Coast Medical Emergency.[2] He was treated in the emergency room and released the same day. The doctors took x-rays and an MRI. They also prescribed medication and bed rest. (Tr. 40).

After his emergency room visit, Claimant saw Dr. Roger Reed, a Primary Care physician. Dr. Reed took more x-rays, prescribed medication and placed him on modified work duty. Although Claimant was placed on modified duties, Employer did not have a modified job available. Claimant recalled treating with Dr. Reed two or three more times. Dr. Reed ordered an MRI

[2] Claimant testified differently during his deposition that Employer's medical department sent him to Garden Park Hospital, not Gulf Coast Medical. The record shows Claimant had an MRI of his lumbar spine on March 8, 2001 at Garden Park Medical Center. Claimant also had AP and lateral views of his lumbar spine taken on July 23, 2001 at Garden Park Medical Center. (EX-28, p. 27; EX-22, pp. 10, 13).

on July 30, 2001. After the MRI, Dr. Reed did not make any referrals, but sent Claimant back to Employer with different restrictions. Claimant did not testify about his new restrictions. Employer still did not have modified work available for him. (Tr. 40-42).

At this point, Claimant picked Dr. Azar as his choice of physician. Dr. Azar prescribed medication and bed rest, which did not help. Dr. Azar also prescribed physical therapy which helped somewhat. (Tr. 42-43).

After Claimant completed physical therapy, Dr. Azar referred him to Dr. Michael Lowry, a neurosurgeon. Dr. Lowry suggested a "Vax-D treatment." Claimant testified he did not receive this treatment because workers' compensation would not approve it. Dr. Lowry also prescribed lumbar traction which "brought somewhat temporary relief." The lumbar traction was done at Rhodes Fitness Center, Memorial Hospital. Claimant recalled seeing Dr. Lowry twice. (Tr. 43-44).

Claimant discontinued treatment with Dr. Lowry because the doctor relocated his practice. Dr. Lowry had not released Claimant to work prior to relocating. Claimant did not select another physician to replace Dr. Lowry. He called Dr. Azar who recommended additional medical treatment and referred him to Dr. Danielson, a neurosurgeon. Claimant did not treat with Dr. Danielson because workers' compensation refused to authorize the change in physician. Claimant went a "couple of months, a couple of days" without treatment with a doctor. (Tr. 44-45).

Subsequently, the claims adjuster scheduled Claimant for an appointment with Dr. Smith. Dr. Smith "just spoke with [Claimant] pertaining to [his] injury." Dr. Smith prescribed treatment, medication, and ordered a Functional Capacity Evaluation (FCE). Claimant testified he put forth his best effort during the FCE, but Dr. Smith reported Claimant exaggerated his behavior during the examination. After the FCE, Claimant reviewed the results with Dr. Smith who released Claimant to return to work on modified duty. (Tr. 45-46).

After the FCE was performed, Claimant returned to work and was assigned "a combination of sweeping and flat welding." Prior to this assignment, Employer never assigned Claimant a sweeping job. He welded while sitting on a discarded life preserver. His supervisor during this time was Michael Wheat. (Tr. 46-48).

Claimant testified he felt he was not working within his restrictions when he returned to the combination flat welding

and sweeping job. Michael Wheat's immediate superior was Charley Dupree. Claimant mentioned to Mr. Wheat on several occasions he was working outside of his restrictions. Claimant also filed a grievance, but did not know the result of his grievance. (Tr. 48-49).

He worked in the maintenance department from September through October 2002. His position in the maintenance department ended in November 2002 and Claimant began a welding re-certification program. Claimant did not know why his maintenance position was terminated because there were still tools that needed repairing. No one from Employer explained why he was taken off maintenance work or why he was asked to re-certify as a welder. Claimant completed the re-certification but had problems bending, lifting, holding his arms up, standing still and welding overhead. (Tr. 52-53).

When Claimant attempted to re-certify he experienced increased pain in his lower back. At this point, in November 2002, Claimant returned to Dr. Smith for treatment. Claimant advised Dr. Smith he was having additional problems performing his modified work with Employer. Dr. Smith reevaluated Claimant and notified Employer that Claimant "should not go out in the field with welding, but rather should stay with flat welding. Ideally, he should be allowed to stay in the maintenance area permanently." Dr. Smith also informed Employer that Claimant should not go to welding school. After the changes were made, Claimant presented himself to Employer for return to work. Employer could not accommodate the new restrictions and did not offer him work. Specifically, Employer responded "that the maintenance department wasn't [his] craft and that [he] would have to do [his] craft which is welding." (Tr. 49-51, 53; EX-23, pp. 33-34).

With the additional restrictions, Claimant painted and swept for Employer under the supervision of Mr. Wheat. He had difficulty performing the painting tasks. Claimant advised Mr. Wheat he was having difficulty painting because of the constant up and down motion. In addition, sweeping caused lower back pain. He did not recall Dr. Smith assigning any twisting or bending restrictions. (Tr. 53-54).

Since November 2002, Dr. Smith pulled Claimant off of work duty after he "had the episode at work of intense pain, low back pain." This episode resulted from "[p]ulling long lengths of welding machine lines, repetitious bending and twisting . . . ." (Tr. 55).

Claimant spoke with his supervisors about working outside the restrictions set by Dr. Smith. There were times he could not work because he was in too much pain. There were also days when Claimant had doctors' appointments. Claimant never met Mr. Tommy Sanders the vocational rehabilitation expert. (Tr. 56-57).

Claimant listed the dates he missed from work due to back pain and doctors' appointments. Claimant treated with Dr. Jackson for lower back pain on: October 1, 2003, October 9, 2003, October 15, 2003, January 12, 2004, and March 22, 2004. He did not receive workers' compensation benefits or sick pay for these days. Claimant treated with Dr. Smith on July 23, 2003, August 8, 2003, and November 5, 2003. Claimant did not receive workers' compensation benefits, sick pay, or salary for these days either. (Tr. 58-60; CX-18).

He also listed days he took off as "vacation days:" October 22, 2003, July 6 and 12, 2004, May 4-5, 10, and 31, 2004, April 2, 2004 and August 3, 2004. Claimant testified these days were days he was not "able to work due to increased back pain and because [he] couldn't get a doctor excuse from Dr. Smith. [He] was refused an excuse." Claimant received "vacation pay" for these days. He did not treat with any physician on any of these dates. (Tr. 60-61; CX-18).

Claimant testified he contacted Employer and advised them he would not be in to work on the days listed as "vacation days." He spoke with Nancy and Paul in the operation trailer. After he advised them he would not be in to work, they did not make any suggestions of what he should do. Claimant further testified he was having "a lot of difficulty" with workers' compensation, but admitted he never talked to his claims adjustor on the days he could not go to work because of his back pain. (Tr. 61-64).

Since returning to work on modified duty, no one has discussed terminating Claimant's employment, but he has received two warnings for unsatisfactory work. Claimant's warnings were for lack of production. Ronnie English gave Claimant these warnings. Claimant only discussed these warnings with Mr. English. (Tr. 65-66).

Dr. Smith referred Claimant to Dr. Joe Jackson. Dr. Jackson performed acupuncture on Claimant, who admitted the acupuncture brought him relief. When Dr. Smith initially recommended acupuncture, workers' compensation refused authorization. Claimant's last acupuncture treatment was three or four months prior to the formal hearing. (Tr. 66-67).

Claimant continues to use the "piece of pad to sit on" when flat welding. He also sits on a smaller bucket with extra padding. Claimant brought tools and equipment to the job site to help him with the job. He brought a luggage rack/dolly to transfer a wire feeder, welding wire, and tools. His supervisors are aware Claimant uses the dolly. (Tr. 67-68).

Claimant testified he was at work when Mr. Sanders came to Employer's place of business, on July 22, 2004, but did not speak with him. Claimant did not perform any of his job functions in the presence of Mr. Sanders. At the time of Mr. Sanders's visit, Claimant was "sweeping." Claimant previously reviewed Mr. Sanders's July 22, 2004 report, and testified there were factual errors. Specifically, the welding discussed in the report was actually done on July 23, 2004, outdoors, not at Bay 6 as the report suggested. Claimant testified that the welding he performed outdoors on July 23, 2004, consisted of "very little welding on the table for the composite department." Claimant denied Mr. Sanders asked Claimant to speak with him about the work Claimant performed for Employer. (Tr. 68-70; EX-31, p. 1).

When Claimant worked in the maintenance department in August and September 2002, the welding was not as intense. Since returning to his modified welding job, Claimant must climb five foot stairs adjacent to the jig. He also needs to climb ladders that "are connected to the units inside and out. They can be anywhere from 6 feet to 20 feet." Claimant admitted Dr. Smith placed him on permanent restriction of occasional ladder climbing, but he climbs ladders consecutive days, throughout the eight hours. Claimant testified he climbed ladders throughout the day on April 15, 16, 19, and 20, 2004, while he worked on the inside of a module. (Tr. 70-72).

Claimant requested authorization to change his choice of physician to Dr. Frank Schiavi, who deals with back injuries. The request was made to Jessica Walling, with workers' compensation, during a conference call with his attorney in September 2003. (Tr. 72-75).

At the time of formal hearing, Claimant did not have any doctors' appointments scheduled. Dr. Smith did not tell him to return for care. In addition, all of Claimant's medical bills have been paid by Employer. (Tr. 75-76)

On cross-examination, Claimant admitted he did not have surgery following either of his injuries. He returned to work for Employer in March 2002 and has received regular raises. He

considers himself a good welder and feels he gives Employer the "best" day's work that he can. (Tr. 76-77).

Claimant recalled completing an employment application when he first worked for Employer. He never graduated from high school and never received a GED; however, his application stated he graduated from Vaskon High School in 1976. He admitted he was untruthful so he could work for Employer. (Tr. 77-78; EX-1, p. 1).

Claimant's first injury occurred while twisting in a tight space. Dr. Smith performed an MRI and advised Claimant he did not need surgery. Dr. Smith released Claimant to work at full duty on June 15, 2001. Prior to his first injury, Claimant worked all over the ships and climbed oil derricks, however, since his first injury Employer voluntarily agreed to work with him and put him on the flat. Working on the flat means he welds on the deck – "a joint, steel, a bulkhead." When he flat welds, he is usually sitting down either on padding or a bucket with padding. (Tr. 78-80).

After his July 23, 2001 injury, Dr. Smith released him to return to work on March 12, 2002. Dr. Smith assigned several restrictions – "lifting up to 35 pounds, pushing-pulling 45 pounds, [he] could sit, stand, or walk 30 minutes at a time, and also . . . could do occasional ladder climbing, and that [he has] no problems kneeling, crawling, bouncing, or reaching." Claimant returned to work as a welder with the same seniority and first shift as before his injuries. (Tr. 88-89).

Claimant earns more now, then he did in July 2001. He received consistent raises since 2002. Besides his two prior warning slips, Claimant has not received any other warnings. In February 2004, after the write-ups, Ronnie English advised Claimant that he was in danger of losing his job. Claimant has not received any other warnings. (Tr. 90-91).

Although Claimant has trouble twisting and bending, Dr. Smith has not placed any restrictions on such activities. He testified he lost several hours from work due to his difficulties. (Tr. 96).

Claimant missed 17 days from work due to his injuries. He had doctors' appointments for eight of those days and took the other nine days as "vacation days." For each of the eight days, Claimant had medical appointments and received slips from the doctors after treatment. Claimant testified he submitted the slips to his foreman and operations trailer, but never submitted them to workers' compensation or his adjuster, Ms. Walling.

Claimant denied receiving payment of any kind for the days he went to the doctor. (Tr. 96-97).

Claimant admitted he received payment for the other nine days as vacation pay. He specifically claimed those days as vacation days. Vacation days are paid as full salary. Initially, Claimant testified he never tried to get those days paid under workers' compensation because he never contacted his adjuster. He then corrected himself and testified he contacted Ms. Walling in the Labor Relations Department about getting his vacation days back. Employer advised Claimant they do not reimburse for vacation days taken. (Tr. 98-99).

On November 16, 2002, Dr. Smith revised Claimant's restrictions to restrict where he worked. Dr. Smith wanted him to work only in maintenance or flat welding. When Claimant returned to work in December 2002 he not only flat welded, but also swept clips and collars. He was not welding in the field or in school. Claimant understood his restrictions as no lifting more than "10 pounds from the FCE." (Tr. 100-101).

When Claimant first returned to work, Employer could not place him because of his restrictions. Claimant was not aware Dr. Smith reported he did not care where Claimant worked as long as he worked within the restrictions assigned. Claimant returned to work December 18, 2002. (Tr. 102; EX-23, p. 35).

Claimant went to Dr. Smith for the acupuncture referral because he considered Dr. Smith to be his doctor. Dr. Smith first referred Claimant to Dr. Roman Kessler, but he did not do acupuncture, therefore Claimant got a referral to Dr. Joe Jackson. Employer authorized and paid for his treatment with Dr. Jackson. Claimant received a series of eight acupuncture treatments. Dr. Jackson released Claimant to return to work with the same restrictions assigned by Dr. Smith. Claimant returned to work for Employer and has worked regularly and continuously since October 2, 2003. He testified he has "been working the best [he] can with pain, and [he] did have a [sic] episode, another episode in January 21, of 2003, where I had to go the emergency room." (Tr. 102-104)

Claimant contends he is a benefit to Employer and wants to continue working there. He makes more money than he earned prior to his injuries and works the same number of hours. Claimant believes he gives a good day's work for a good day's pay, but some days he works less hours. Claimant did not take vacation days when he left early. He would leave early because of "intense low back pain and [he] would leave maybe 2:30-2:00 or something." Claimant has also left early due to doctors'

appointments. (Tr. 104-105).

Claimant testified he does not always work on the flat and is sometimes required to climb ladders. Claimant did not count how many times he was on the ladder. Depending on the circumstances of the job, he could climb a series of ladders. Claimant admitted he is able to do some ladder climbing within his restrictions. He did not know how much time he spent on the ladder. He testified he mostly climbed five-foot stairs. (Tr. 105-108).

Dr. Smith restricted him to no more than 30 minutes of walking at one time. Dr. Smith did not put any limitations on climbing stairs. Employer knows about his "restriction that after 30 minutes of solid work [he] can take a breather." Claimant testified he does not abuse this restriction, but takes the breaks. (Tr. 108-109).

Claimant testified the day after Mr. Sanders' July 22, 2004 visit, he "[w]elded a small amount of welding on the table, welding the table outside, and also before that sweeping." He is required to pull his welding lines. Claimant is not provided a helper to pull the lines. (Tr. 146-147).

Claimant disclosed he complained to Mr. Wheat or Mr. Dupree about pulling welding lines. He told them it aggravated his back, but was told it "[g]ot to be done." He has never weighed any of the welding leads, but testified they are "very heavy, and tangled." (Tr. 148-149).

**Charles Gerald Dupree**

Charles Gerald Dupree testified live for Employer. In 1996, he became a "team leader" for Employer in Gulfport, Mississippi. (Tr. 114).

Mr. Dupree oversees his supervisors and the subordinates of such supervisors. Michael Wheat is one of his supervisors and Claimant is an employee of Mr. Wheat. Mr. Dupree sees Claimant about five days a week "when he's there." He is aware Claimant received a couple of injuries working for Employer, but that he is back at work under restrictions. Mr. Dupree is aware of Claimant's restrictions. He is restricted to lifting no more than 35 pounds, no pushing or pulling over 45 pounds and can sit, stand or walk for 30 minutes at a time with breaks in between. Claimant is also able to do occasional ladder climbing and has no problems kneeling, crawling, bouncing, or reaching. (Tr. 115-116).

Mr. Dupree participated in the decision to return Claimant to work within his restrictions. After reviewing Claimant's restrictions, he advised the medical department that he had welding work for Claimant. He testified there is a lot of simple, flat welding to do on modular welding. Claimant could just sit and weld all day. Mr. Dupree offered work to Claimant within his restrictions as outlined by Dr. Smith. Claimant returned to work in this modified capacity about two years ago and received the same raises as the other welders. (Tr. 117).

Mr. Dupree testified Claimant has good attendance and is a good employee. He confirmed Claimant's work is of "good quality" and his job is as permanent as anyone working for Employer, even with his restrictions. Mr. Dupree denied that flat welding requires Claimant do anything outside his restrictions. If Claimant has a question or a problem arises, he is free to speak to Mr. Dupree or any other supervisor. In fact, Claimant, on several occasions, had problems and was sent to medical. Claimant's work was adjusted when he had problems. If there was "something maybe too high to climb or in a bad area we'd take him out, and if we didn't have nothing else we'd put him sweeping." (Tr. 118-119).

He denied Claimant climbed ladders often and stated a welder may go up a ladder and be in an area for two or three hours and come out about three or four times a day. He did not believe Claimant spent more than four or five minutes in a day on a ladder. Claimant has not advised him of any problems climbing ladders. (Tr. 119).

Mr. Dupree could not recall whether the warning slips he gave to Claimant were for poor work or lack of production, but believed he gave two for lack of production for not meeting a footage rate. He denied anything about Claimant's restrictions would have prevented him from meeting his goal. Mr. Dupree continues to have suitable work for Claimant who is in no danger of losing his job. (Tr. 119-120).

Mr. Dupree never noticed Claimant carrying a little notebook around with him. He testified Claimant works both inside and outside. Claimant does not have to lift anything outside of his restrictions when he flat welds. When he works inside, Claimant gets "up on the deck and weld[s] flat frames." As long as Claimant continues to be productive he will remain employed by Employer. (Tr. 120-121).

On cross-examination, Mr. Dupree explained the footage lack of production. "Depending on the size of the weld, for instance a five-sixteenth weld we normally look for welders to get

approximately 14 to 15 foot an hour." He could not recall exactly when Claimant received the warnings. The penalty for lack of production is a warning slip and after "so many warning slips it'll come to like a one-day layoff." (Tr. 121-122).

Mr. Dupree acknowledged Claimant takes a five minute break every 30 minutes. No one in management has complained to Mr. Dupree that Claimant took too long on his breaks, went to the bathroom too much, or loafed around. If Mr. Dupree worked an employee outside his restrictions, Employer would contact him and the medical department would come out and check that the employee was worked within his restrictions. Mr. Dupree was not aware that Claimant complained to anyone. He was unaware of any discussion Claimant had with Mr. English, Mr. Wheat or anyone else in a supervisory or management position about being worked outside his restrictions. (Tr. 121-123).

If an employee advises Mr. Dupree that he is taking medication, it is Employer's policy to send that employee to the medical department which will call the supervisor back and advise him whether the employee can work on the medication or not. Sick days, for all employees, come under workers' compensation and Mr. Dupree does not deal with that. Mr. Dupree did not meet with Tommy Sanders, Employer's vocational expert on July 24, 2004, but believes Mr. Sanders met with Mr. McBride. Mr. Dupree could not recall having any conversations with Mr. Sanders and did not pay attention to what he was doing when he was at Employer's jobsite on July 2004. (Tr. 123-125).

There are several grounds for immediate discharge from Employer, including "sleeping or deliberately loafing." Claimant has never been accused of deliberately loafing or sleeping. (Tr. 125-127, 129).

If Claimant needed to "early out" for the day, he would go to his immediate supervisor, Michael Wheat, who then comes and tells Mr. Dupree. Throughout the day, Mr. Dupree asks Mr. Wheat about attendance. Mr. Dupree could not recall many "early outs" taken by Claimant, but testified every morning he asked about attendance and Mr. Wheat would tell him when Claimant called in for vacation. Mr. Dupree was unaware Claimant was not paid workers' compensation for days he was off work seeing a doctor. He was unaware of any days where Claimant requested to work in the bay, but was not allowed to do so. (Tr. 127-128).

On re-direct examination, Mr. Dupree admitted the medical department took Claimant off of maintenance work. "Medical will assign people a job that's on light-duty, and they send them back to me when they're ready to work." (Tr. 128-129).

**Michael Anthony Wheat, Sr.**

Michael Anthony Wheat, Sr. also testified live for Employer. Mr. Wheat is Employer's welding foreman in Gulfport, Mississippi. He has worked for Employer for nine years. Mr. Wheat has a twelve man crew, which includes Claimant. Claimant has worked for Mr. Wheat since returning to work on modified duty. He is aware Claimant returned to work originally in March 2002 with work restrictions and is familiar with those restrictions. He is aware Claimant cannot lift over 35 pounds, is unable to push or pull greater than 45 pounds, and can only occasionally climb ladders. He is also aware Claimant can only sit, stand or walk for 30 minute periods with breaks in between, but can knee, crawl, balance and reach without restrictions. (Tr. 130-132).

Mr. Wheat did not participate in the decision to return Claimant to work, but was made aware of his restrictions. Mr. Wheat testified he "definitely" provided Claimant with work within those restrictions. Claimant mostly flat welds, cleans and sweeps. Keeping the shipyard clean is part of Mr. Wheat's job which is an everyday thing for a cleanup crew. All of these jobs are within Claimant's restrictions. (Tr. 132-133).

Mr. Wheat confirmed Claimant has worked regularly and continuously since 2002. He also testified Claimant has good attendance. Mr. Wheat denied giving Claimant any warning slips for doing poor work. He considers Claimant a good employee and has been satisfied with the quantity and quality of his work, but "right now everything is so slow we really ain't [sic] getting the quality and either the quantity right now because we're scrapping a lot, you know, trying to find something for them to do." They always need to keep the shipyard clean for the next contract. Mr. Wheat also confirmed Claimant's job is as permanent as any other employee. (Tr. 133-134).

Mr. Wheat believes he has a good working relationship with Claimant and would like to see him continue working in his crew. Claimant received the same raises as the other welders and works 40 hours per week at a rate of $16.46 per hour. (Tr. 135).

Mr. Wheat did not know Claimant filed a grievance. He heard rumors about the grievance but he did not participate in it and does not know how it turned out. He testified it appears Claimant is doing okay in his job, but they are not doing much right now. Claimant has not complained or caused Mr. Wheat any trouble. (Tr. 135-136).

On cross-examination, Mr. Wheat clarified that Claimant has not worked everyday. He is aware Claimant took days off, but does not know whether it was to treat with doctors or not. Claimant just told him he wanted a day off or "early out." Mr. Wheat would not question why or where he was going. The most recent day off for a doctor's appointment was the week before formal hearing. Mr. Wheat could not recall other notifications by Claimant because he sometimes works in a "noisy area." Claimant must get permission from medical who decides whether he can go to a doctor or not. Mr. Wheat denied Claimant told him he was using vacation days. (Tr. 136-137).

Claimant does not have a designation in a cleanup crew, but because there is no available welding that is mostly what they are doing right now. Mr. Wheat does not know why Claimant was taken out of the maintenance position because he was not working with him at that time. (Tr. 138).

The only physical thing required of Claimant when welding collars is to "sit right here and weld it up and around." It does not require climbing a ladder. Claimant did not have to climb ladders in a unit, but did have to climb stairs. When Claimant climbed up on catwalks he would work "[f]lat, on the bulkheads and stuff on the unit." Mr. Wheat reiterated Claimant did not work on ladders, but did work on a stairway. Mr. Wheat testified there were ladders on the inside of the unit for other people working in the unit, but Claimant did not have to climb the ladders. Claimant would only need to climb three to four steps to get on the platform. (Tr. 138-140).

Since becoming Claimant's supervisor, Mr. Wheat testified there were occasions where Claimant "loafed." Mr. Wheat discussed this matter with Claimant and told him to "speed up and get more production done." Mr. Wheat considered Claimant's loafing to be intentional. (Tr. 140).

Since Claimant returned to work on modified duty he has not been required to pull welding lines or leads. If Claimant has pulled lines or leads it is "up to him if he grab a line and pull it when I'm not around there, other than that he don't have the, he's not . . . told to pull any lines . . . All he's told to do right now for the longest is, when we're cleaning up, to clean up, you know, what everybody else does." (Tr. 141-142).

Mr. Wheat never wrote a medical pass for Claimant to go to the doctor, but has written him a yard pass. A yard pass is a blue pass that one gets to go out the gate. He would also need a yard pass to go to medical, but it would never be a medical pass. A medical pass would only be issued if someone got hurt

or was sick. (Tr. 142-143).

Mr. Wheat was not involved with the grievance Claimant filed with Employer and was not contacted by Employer regarding disciplines or warnings given to Claimant. Mr. Wheat does not know Mr. Sanders, but met with both Mr. Sanders and Mr. Quentin McBride on July 22, 2004. They all walked around the yard and looked at areas where Claimant performed work. They did not see Claimant that day. Mr. Wheat showed Mr. Sanders the type of work Claimant performed when he was welding. On July 22, 2004, during Mr. Sanders's visit, Claimant worked cleanup. Claimant was not asked to give any comments to Mr. Sanders. (Tr. 143-145).

Claimant uses a 15-pound welding box. The welding whip weighs anywhere from five to ten pounds. The last time Claimant took off early, he advised Mr. Wheat he was going to medical. Mr. Wheat could not recall other occasions where Claimant advised him he was taking an "early out." (Tr. 145).

**The Medical Evidence**

**Joseph Dan Hull, M.D.**

Dr. Joseph Dan Hull, a workers' compensation physician, initially treated Claimant on January 30, 2001, after his initial injury. Dr. Hull is a board-certified occupational and environmental physician at Primary Care Medical Center. He diagnosed Claimant with a lumbar spine strain and spasm, prescribed medication and physical therapy, and returned him to work with modified duties. Claimant returned for a follow-up visit on February 2, 2001, where there was evidence Claimant's lumbar sprain had improved. Dr. Hull returned Claimant to work with normal duties on February 3, 2001. Claimant could not work on February 2, 2001, because his medication made him drowsy. Dr. Hull advised Claimant to "be careful." Claimant treated with Dr. Hull three more times in February 2001 due to complaints of lumbar strain and spasm. Dr. Hull's prognoses ranged from "good" to "fair." (EX-22, pp. 1-9; CX-16, pp. 38-44).

On March 8, 2001, an MRI of Claimant's lumbar spine indicated "back pain and degenerative disc disease." Dr. Raymond E. Tipton, radiologist, reported an impression of "annular protrusion of the L4-5 disc with mild displacement of the L5 nerve roots bilaterally. Right posterior protrusion of the L5-S1 disc without apparent nerve root impingement." Claimant last treated with Dr. Hull regarding his first injury on March 12, 2001. At that time, Dr. Hull examined and

discussed with Claimant his injury and modified duties. Dr. Hull also re-prescribed Claimant's medications of Celebrex and Trazadone. (EX-22, pp. 10-11; CX-16, pp. 35-37).

Claimant returned to Dr. Hull after his second injury on July 23, 2001, per discharge instructions from Garden Park Medical Center. He suffered from pain in his lower back and buttocks. Dr. Hull prescribed bed rest and medication. He advised Claimant to stay home from work and scheduled a follow-up visit. (EX-22, pp. 14-17; CX-16, pp. 29-34).

During his follow-up visit, Claimant complained of pain in his lower back and right foot, inability to sleep because of the pain, and medications not working. Dr. Hull noted no change in Claimant's physical examination and recommended an MRI of the lumbar spine. Dr. Hull re-prescribed bed rest and medications. (EX-22, p. 18; CX-16, p. 28).

An MRI of Claimant's lumbar spine was taken on July 30, 2001, indicating L5 strain. Dr. Tipton reported "broad based disc protrusion of the L4-5 disc with mild displacement of the L5 nerve roots bilaterally. Mild right posterior protrusion of the L5[-]S1 disc without apparent neural impingement. No significant change is seen as compared to the study of 8 March 2001." (EX-22, p. 20; CX-16, p. 27).

Claimant continued treating with Dr. Hull due to complaints of back pain and "tingling" in his right foot which increased with prolonged sitting. Prolonged sitting also increased pain in his right buttock. Dr. Hull reported Claimant could return to modified work on August 2, 2001. Dr. Hull restricted Claimant to "no climbing," "no bending, stooping, overhead work" and "limited restrictions on lifting, pulling twisting motions not to exceed 20 pounds." Dr. Hull also prescribed physical therapy evaluation. (EX-22, pp. 22-24; CX-16, pp. 23-26).

On August 6, 2001, Dr. Hull established a "plan of care." Dr. Hull believed Claimant had "good" rehabilitation potential and prescribed heat, electrical stimulation, soft tissue mobilization, traction, lumbar, ultrasound and therapeutic exercise. Dr. Hull believed with this plan of care, in four weeks Claimant could return to work at light duty and progress to regular duty. (EX-22, p. 25; CX-16, p. 22).

**Primary Care Medical Center**

Claimant underwent physical therapy at Primary Care Medical Center for several weeks in August 2001 and again for several weeks in December 2001. After Claimant received seven

treatments, he continued to experience pain. Dr. Hull recommended a continuation of physical therapy. On August 31, 2001, Dr. Hull discontinued treatment and emphasized stretching, strengthening and patient education, noting: "Patient did not wish to [discontinue] the traction however and states that he doesn't wish to be rushed back to work until his back is healed." (CX-16, pp. 1-21).

Claimant returned for more physical therapy in December 2001. Another "plan of care" was established which included heat, soft tissue mobilization, lumbar traction, "back school," ultrasound, active and passive therapeutic exercise, and joint mobilization. Claimant's rehabilitation prognosis was "fair" to "good." Although Claimant underwent physical therapy, there was no significant change in his function or pain. (CX-16, pp. 1-8)

**Nabil Azar, M.D.**

Dr. Nabil Azar, an internal medicine physician, excused Claimant from work from August 1, 2001 until August 22, 2001, due to back pain. Dr. Azar is Claimant's choice of physician. He also excused Claimant from work from September 7, 2001 until September 21, 2001, due to back pain and disc protrusion in his spine. (EX-24, p. 1; CX-17, p. 2).

On August 22, 2001, Claimant received seven treatments including heat and intermittent pelvic traction. Dr. Azar recommended continued physical therapy treatment. On August 29, 2001, Claimant showed minimal signs of improvement with traction and increased hamstring tightness. Therefore, Dr. Azar suggested discontinuing treatment and emphasized more therapy exercises including stretching, strengthening and patient education. Claimant advised Dr. Azar he did not wish to discontinue traction and "he doesn't wish to be rushed back to work until his back is healed." Dr. Azar mentioned possible chiropractic treatment if Claimant did not get better with physical therapy. (EX-24, pp. 2-3; CX-17, pp. 3).

Dr. Azar notified Employer that he agreed with Dr. Smith's recommendation regarding Claimant "to follow[-up] with neurosurgery for continued care." (EX-24, p. 4; CX-17, p. 1).

**Michael W. Lowry, M.D.**

On September 6, 2001, Dr. Michael Lowry, a neurosurgeon, evaluated Claimant's lower back, right buttock pain, and right foot paresthesias pursuant to a referral from Dr. Azar. Claimant informed Dr. Lowry of both prior injuries and all subsequent treatment received. Physical examination revealed

Claimant bent "slowly in all directions. Straight leg raising test caused increased pain in the back on both sides but seemed to be worse on the right. However, there did not appear to be any radiation of pain into the legs." Dr. Lowry opined Claimant suffered from degenerative lumbar disc disease with bulging discs. Dr. Lowry recommended "Vax-D" therapy, no work and prescribed Lortab-5. (EX-25, pp. 1-3; CX-14, pp. 5-7).

Dr. Lowry reported a "lumbar cushion is necessary for [Claimant] due to a diagnosis of HNP, Lumbar 722.10." He opined Claimant was unable to work until completion of the "Vax-D" therapy and was "to be considered temporarily totally disabled." (EX-25, pp. 4-5; CX-14, pp. 3-4).

Dr. Lowry completed a "Request for Medical Information" form for Employer to assist Employer "[f]or the intelligent assignment of work" for Claimant. Claimant's diagnoses included degenerative lumbar disc disease and bulging disc at L4-5. Dr. Lowry informed Employer treatment began on September 6, 2001 and would continue through the completion of a "Vax-D" therapy program. After completion of the "Vax-D" program, Dr. Lowry wanted to re-evaluate Claimant. Dr. Lowry further advised Employer, Claimant was prescribed Lortab-5 and should not work "at this time." Dr. Lowry opined Claimant was "temporarily totally disabled" and should not walk longer than 30 minutes at a time with no bending, stooping, or twisting. (EX-25, p. 6; CX-14, p. 2).

On December 3, 2001, Dr. Lowry assessed a "plan of care" for Claimant and notified workers' compensation that Claimant needed evaluation and treatment for his lumbar region including hot packs, exercise, and lumbar traction. Dr. Lowry opined Claimant needed additional treatment three times a week for four weeks. (EX-25, pp. 7-8; CX-14, p. 1).

**Terry C. Smith, M.D.**

Dr. Hull referred Claimant to Dr. Smith for a neurosurgical evaluation on March 27, 2001. After reviewing Claimant's MRI, Dr. Smith reported he did not agree with the radiologist's reading and opined Claimant "just [had] a bulging disc at L4/5. [Dr. Smith] cannot relate his symptoms to that, and I think he has a lumbar strain." Dr. Smith advised Claimant his options were "to live with it, try further therapy, or to try steroid injections." After discussing possible future Discography, Claimant responded he would not have surgery. (EX-23, pp. 1-2; CX-13, pp. 39-40).

Every time Dr. Smith attempted to advise Claimant of his

plan, Claimant reiterated "he re-aggravates himself every time he goes to work." He conveyed Claimant only wants "to be out of work." He advised Claimant he could keep him out of work for one week, but could not do so indefinitely because "the studies have not shown that being out of work for prolonged periods of time makes any difference in the pain of this sort, and that it would be better to take a more active approach toward getting him better." Claimant then discussed religion with Dr. Smith and stated the doctor lacked compassion for him. Dr. Smith advised Claimant to ask "Workers' Compensation to get an opinion from another specialist because the only thing [Claimant] will accept is being off work for a prolonged period of time, and [Dr. Smith was] not willing to do that, especially without adjunctive means of treatment." He prescribed Claimant Amitriptyline to replace the Trazadone Claimant took for sleep. (EX-23, p. 2; CX-13, p. 40).

Dr. Smith returned Claimant to work on March 28, 2001, at light duty, but Employer did not have light duty work and Claimant was not allowed to return. He released Claimant to regular duty work on June 15, 2001. (EX-23, pp. 3-6; CX-13, pp. 37-38, 41).

Employer asked Dr. Smith to provide a second opinion regarding Claimant on December 11, 2001. Claimant relayed his second injury and subsequent medical treatment to Dr. Smith. He also complained of pain in his

> lower back going to his right buttock and occasionally his right foot will tingle and feel numb, but he does not have any right leg pain. Sitting, standing or bending too long causes symptoms. Hyperextension of the back helps. He hurts even if he is in bed, especially in his testicles. He has had some recent dizziness, which he attributes to Lortab that he is taking.

Physical examination revealed relief of symptoms during back extension, but pain to his back during flexion. (EX-23, pp. 7-8; CX-13, pp. 34-35).

During the second opinion evaluation, Dr. Smith reviewed the new MRI scan and again disagreed with the radiologist's readings. He "would call it a normal Scan, with the exception of a very minimal bulge at L4/5." Dr. Smith did not see definite nerve root compression and reported Claimant's symptoms were not radicular. (EX-23, p. 7; CX-13, p. 34).

Claimant started lumbar traction the day before Dr. Smith's evaluation. Dr. Smith did not recommend further diagnostic tests because he did not think they would show anything different. Dr. Smith recommended monitoring the traction visits and if the first six approved visits helped Claimant, then Employer should approve another six traction treatments. Once Claimant completed the traction treatments, Dr. Smith recommended a FCE to determine Claimant's abilities and limitations in preparation for return to work with permanent restrictions. Prior to the FCE, Dr. Smith opined Claimant could return to work "with a lifting maximum of 50 pounds, sticking to 35 pounds most of the time. He should avoid repetitive bending, twisting, stooping and should avoid sustained back positions." Dr. Smith gave Claimant a 5% impairment rating to the whole person based on the Fourth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. He did not recommend surgery. (EX-23, p. 8; CX-13, p. 35).

The FCE was performed on February 20-21, 2002. Dr. Smith opined that although Claimant did not exhibit symptom magnification, he did not give his maximum effort and had "episodes of exaggerated pain behaviors during physical testing." Claimant demonstrated a sedentary physical demand level, but his current occupation was defined as "heavy." He displayed "functional kneeling, crawling, balancing, reaching, and stair climbing on a frequent basis." He also displayed tolerance to squatting, sitting, standing, walking and ladder climbing on an occasional basis. Dr. Smith was unable to obtain an aerobic capacity because Claimant was unable to walk less than 0.7 miles per hour in less than two minutes. He was unable to bend forward and had increased pain with repetitive squats. He demonstrated frequent weight shifts during the standing, sitting and walking tests, but the tests were not completed because Claimant terminated them. He also had difficulty performing six repetitions of ladder climbing. (EX-23, pp. 10-30; CX-13, pp. 6-33).

Claimant maintained a stiff posture throughout the FCE testing. He also asserted a "subjective pain report of 7/10 throughout the second day of testing." Dr. Smith reported Claimant should avoid floor to knuckle height material handling because he cannot perform such activities safely, however he also noted Claimant demonstrated exaggerated pain behaviors during testing. Dr. Smith restricted Claimant to sedentary work which requires a physical demand of occasionally lifting 10 pounds. Claimant suffered from prominent loss of all planes except moderate loss of lumbar extension. (EX-23, pp. 10-30; CX-13, pp. 6-33).

Claimant followed-up with Dr. Smith on March 8, 2002. On physical examination Claimant had "mild tenderness to palpation over the lower back." Dr. Smith also reviewed the FCE and reported:

> Although he did not exhibit symptom magnification, he did not give his maximum effort meaning "episodes of exaggerated pain behaviors during physical testing." Because of this lack of giving maximum effort, [Dr. Smith] upgraded some of the measurement of the FCE. [Dr. Smith did] think that he could go back to work with restrictions . . . lifting a maximum of 35 pounds, a pushing and pulling maximum of 45 pounds . . . could sit, stand or walk for 30 minutes at a time, and then have a break . . . occasional ladder climbing . . . no problem with kneeling, crawling, balancing, or reaching.

Dr. Smith reported he believed when Claimant left his office, as usual, he was "not all understanding of the situation, and . . . was not at all happy." (EX-23, p. 31; CX-13, p. 4).

Claimant returned to Dr. Smith for a follow-up on November 16, 2002. Dr. Smith had not seen Claimant since placing him on permanent restrictions in March 2002. Claimant relayed he "got worse on Tuesday . . . when [Employer] sent him to welding school to get re-certified, which was strenuous, and he says that he has worsened pain in his mid lower back going to the buttocks and gluteal crease." On physical examination, Claimant jumped when Dr. Smith touched his lower back. Dr. Smith reported Claimant "does not cooperate very well with strength testing, and his strength seems normal." Dr. Smith kept Claimant off of work for two work days and returned him to work on November 20, 2002. He wrote Claimant a slip that he should not go to welding school or weld out in the field. Specifically, Claimant should stay with flat welding. Dr. Smith reported, "[i]deally, he should stay in the maintenance area permanently." Dr. Smith gave Claimant pain medication and a muscle relaxer to help him get over "this little spell" and advised Claimant he was going to have "these spells intermittently throughout his life." (CX-23, p. 33; CX-13, p. 2).

In response to a letter sent to him by F.A. Richard and Association (FARA), Dr. Smith informed Employer that Claimant was capable of working within the original permanent work restrictions as outlined in his FCE. In addition, he was

capable of working in any area as long as Employer assigns work within those permanent restrictions. Dr. Smith made a notation that Claimant "told [him] that he was only put in a more strenuous position to get re-certified in welding – he has been at the other job [in the maintenance department] for some time – why did they change suddenly? Why can't he stay where he was?" (EX-23, p. 35; CX-13, p. 1).

Dr. Smith did not treat Claimant again until July 23, 2003, for another follow-up visit. His last visit prior to this exam was in November 2002. Claimant called the office in January 2003 asking to see Dr. Joe Jackson for acupuncture, but workers' compensation would not approve it. Claimant presented for treatment because he recently had "another little spell" with "pain in his lower back going to his right buttock and the posterior thigh, with occasional dead feeling in his right foot." Claimant informed Dr. Smith he went to the emergency room on July 22, 2003, and Employer sent him home from work on July 23, 2003. On physical examination, Claimant "sits tilted to the left" and walks with a limp. Claimant wanted a release back to work for July 24, 2003, with his permanent restrictions and Dr. Smith provided one. Dr. Smith reported he was "going to try once again to set up a visit with Dr. Jackson" and that if workers' compensation would not pay for it, Claimant would submit it to his health insurance company. Dr. Smith informed Claimant for a second time that his discogenic pain could be helped by fusion, but Claimant informed the doctor he wanted to try acupuncture first. (EX-23, p. 36).

Dr. Smith provided Claimant with an excuse for being out of work on August 8, 2003. On August 27, 2003, Dr. Smith requested Employer "please allow [Claimant] to wear an athletic steel toe shoe due to his back problems." On September 11, 2003, Dr. Smith notified Employer that Claimant needed a "five minute break after 30 minutes of sitting, standing or walking." (EX-23, pp. 38-40).

**Joe Jackson, M.D.**

Claimant began treating with Dr. Joe Jackson on September 11, 2003, on referral from Dr. Smith. Claimant presented his medical history to Dr. Jackson, informed the doctor that he worked beyond his restrictions and was unable to take as many breaks as prescribed. Claimant took "personal leave and vacation time to recuperate from pain when he exacerbates his condition on the job." (EX-26, pp. 1-4).

Claimant went to Dr. Jackson's office straight from work. Physical examination revealed Claimant walked with an antalgic

gait and appeared to be in mild discomfort. He also had "marked lumbar flexion, extension and lateral bending restrictions and a positive straight leg raise seated at 60° with trigger points presented in the lumbar erectors and right gluteal musculature." Dr. Jackson opined Claimant suffered from "[c]hronic lower back pain and right lower extremity radicular pain consistent with the patient's diagnosis of L4-5 disc bulge with L5 root impingement and [L]5-S1 disc bulge." (EX-26, p. 3).

Dr. Jackson recommended Claimant initially proceed with a series of three acupuncture treatments and pool exercises with range of motion, stretching and strengthening three times a week for two weeks. Dr. Jackson would only recommend additional acupuncture treatment if the first three sessions showed significant improvement in Claimant. Dr. Jackson opined an aquatic program would be Claimant's best chance at avoiding lumbar surgery. (EX-26, pp. 3-4).

Dr. Jackson prescribed a Lidoderm patch 5% 12-hours on and 12-hours off to the lumbar spine. Claimant did not want additional medication. The doctor also prescribed a "warm and form back brace." Dr. Jackson reported he normally did not like using back braces, but when an individual, like Claimant, with disc disease continues to work at a reasonably heavy level of employment, a back brace would be somewhat beneficial both driving to and from work and while doing laborious employment. Dr. Jackson informed Claimant not to use the brace at any other time. Dr. Jackson reiterated Dr. Smith's restrictions – "no welding on field, no welding school, allow to work maintenance or flat welding and [Claimant] must have 5 min break every 30 minutes" of work. (EX-26, pp. 4-7).

Claimant returned on September 16, 2003, because there was some confusion regarding his work restrictions. Dr. Jackson clarified that while he "agrees with Dr. Smith's weight restrictions[,] since [Claimant] states he has less pain when performing flat welding we request that he be allowed to do this." Dr. Jackson reiterated Claimant should be allowed to take a five-minute break every 30 minutes. Patient informed Dr. Jackson he has less pain when performing flat welding. Dr. Jackson noted while he is not a welder, he can listen to Claimant's job description and detail exactly what exacerbates a physical condition. He opined that what Claimant believes aggravates his condition correlates well with the amount of degenerative disc disease present in the diagnostic studies. Dr. Jackson reported no reason to doubt the validity of Claimant's complaints and therefore believed the restrictions were appropriate and reasonable. (EX-26, p. 8; CX-15, p. 4).

Dr. Jackson performed trigger point therapy on October 1, 2003, which Claimant tolerated well. He opined that Claimant should not return to work after acupuncture treatment and provided Claimant with a certificate for returning to work on October 2, 2003, under the previous restrictions authorized by Dr. Smith. Claimant was informed to follow-up in one week. Claimant's October 2, 2003 certificate for returning to work, noted that Claimant was approved by his workers' compensation carrier for two additional acupuncture treatments and would need to be off from work for those treatments dated October 9 and 15, 2003. Claimant received additional acupuncture treatments on October 9 and 15, 2003. He also received treatment on **November 25, 2003**, January 8, 2004, January 12, 2004, March 22, 2004 and March 23, 2004. (EX-26, pp. 9-19; CX-15, pp. 2-3).

Claimant's first treatment was associated with paraspinal nerve blocks, but his second and third treatments were for acupuncture only. On March 23, 2004, Claimant reported less pain and an ability to go four to five days with minimal discomfort after treatment and gradual increasing pain. Claimant continued to work in between treatments. He conveyed this was the first time he had any significant improvement with his discomfort level since his original therapeutic intervention with Dr. Smith. (EX-26, p. 18).

Claimant informed Dr. Jackson that because of acupuncture he had sufficient relief, was able to do his normal daily routine and could function adequately at work. Due to Claimant's significant response to acupuncture, Dr. Jackson recommended a full course of 12 treatments or as many treatments as Claimant continues to receive benefit from up to 12 treatments. Dr. Jackson suggested reassessment, for continuation of treatment, should occur at 6, 9 and 12 treatments. Dr. Jackson also recommended pool exercise therapy for gradual strengthening of the lower back and right side. (EX-26, p. 18).

**The Vocational Evidence**

Tommy Sanders, a certified rehabilitation counselor, filed a report regarding Claimant on behalf of Employer with FARA. On July 22, 2004, at Employer's request, Mr. Sanders assessed Claimant's job duties and met with Mr. Quentin McBryde, general superintendent and Mr. Michael Wheat, welding foreman. (EX-31).

Mr. Sanders reviewed Claimant's restrictions which included a lifting maximum of 35-pounds; pushing and pulling maximum of 45-pounds; sitting, standing and walking for 30 minutes at a time with a five-minute break in between; occasional ladder

climbing; and no problems kneeling, crawling, balancing, or reaching. Mr. McBryde and Mr. Wheat advised Mr. Sanders that Claimant performed a variety of duties, but worked within these restrictions, primarily "down hand welding." (EX-31, p. 1).

Mr. Wheat demonstrated an "assembly with coaming which was on a jig approximately 18 inches to two feet off ground" and showed an employee can sit on an inverted padded bucket and weld at eye level. Mr. Sanders was not shown any of Claimant's assemblies because according to Mr. Wheat and Mr. McBryde, the majority of Claimant's sub-assemblies and assemblies were completed and shipped. (EX-31, p. 1).

On the day of Mr. Sanders's visit, Claimant was assigned to trash pick-up because there was "a shortage of materials needed to begin another project." (EX-31, p. 1).

Mr. Sanders also observed "a small assembly that was on a large table that appeared approximately three and a half feet off ground" where Claimant had recently welded and performed overhead work "from a squatted or kneeling position just under three and a half feet from ground." In addition, Mr. Sanders observed a "boat deck enclosure" assembly on a jig approximately two to three feet off ground with stairs at one end. This was the only climbing to which Claimant would be exposed. (EX-31, p. 2).

Claimant's additional duties required welding miscellaneous foundations either from the floor or the table top, requiring Claimant to alternate between bending and squatting. "[A]ccording to Mr. Wheat, primarily he has worked from eye level down with very limited overhead welding." Mr. Wheat further advised Mr. Sanders that Claimant mainly worked in the "fabrication portion of production and not the outfitting areas." (EX-31, p. 2).

Mr. Sanders observed welding machines and manifolds located throughout Bay 6 and the area south of Bay 6 and concluded this would preclude the employee from having to lift or carry long welding or air lines. "It was estimated that primarily [Claimant] would work from a 25 to 50 foot line. His welding box, the 10 pound line and welding whip would weight approximately 20 pounds or less." (EX-31, p. 2).

Mr. Sanders noted that Mr. Wheat described Claimant's duties as a welder for Employer. Claimant primarily welds from a sitting position. Welders are required to perform their own preparation. A dolly is used to move welding lines, welding machines and tools from site to site. Mr. Wheat advised Mr.

Sanders that Claimant would occasionally perform overhead work from a squatting or kneeling position. Mr. Wheat "estimated Claimant would sit approximately 50% of the work day, walk 10% to 15%, and stand 35% to 50%. He estimated 75% of the work being performed indoors and 25% outdoors." Claimant did not have to climb ladders, but did have to walk on uneven ground, stoop and bend every 30 to 40 minutes, and squat approximately once each hour for a total of approximately 30 minutes in a work day. Claimant's duties also require him to lift "under 10 pounds five to six hours per day, lifting 10 to 25 pounds less than one time per hour for less than one hour total per day and he would not be required to lift greater than 25 pounds." Claimant would also reach below shoulder height five to six hours per day and reach at shoulder height approximately one to two hours per day. Mr. Wheat further estimated Claimant would carry 10 to 25 pounds less than one hour per day and would utilize a dolly on an average of two times per day, one to begin the job and the other at the end of his shift. (EX-31, p. 2).

Mr. Sanders did not observe Claimant perform "any welding activities but did observe other welders working from a three and a half foot table top as well as in the outfitting area from ladders." (EX-31, p. 3).

Mr. Wheat advised Mr. Sanders that Claimant's production "was average" and Claimant complained about supervisors "bird-dogging" him about his production. Mr. McBryde advised Mr. Sanders that "the work is available to [Claimant] on a permanent basis. (EX-31, p. 3).

Based on his discussion with Mr. Wheat and Mr. McBryde, his observations of the work area, and considering Claimant's limitations prescribed by Dr. Smith on March 8, 2002, Mr. Sanders opined Claimant's work duties were within those limitations. (EX-31, p. 3).

**The Contentions of the Parties**

Claimant contends he suffered 17 days of actual lost wages, between July 2003 and August 2004, because of his back injury. Claimant kept a work diary and noted dates he missed from work. In addition, Claimant maintains he had medical excuses for doctors' appointments for eight of these days. Although Claimant called the other nine days "vacation days" he asserts these days should be paid as compensation rather than vacation days because he took these days off because he suffered from too much pain. Claimant contends Employer erred in not providing him with workers' compensation benefits for all 17 days and Claimant should not be required to give up medical sick time or

vacation time for a work-related injury.

Claimant also contends Dr. Terry Smith is not his choice of physician. Claimant argues he only treated with Dr. Smith because Dr. Lowry, his neurosurgeon, relocated and Employer would not authorize Claimant to see his choice of physician, Dr. Danielson. Claimant asserts he only treated with company physicians. Claimant requested a referral to acupuncturist, Dr. Kessler, but the doctor did not perform acupuncture. Thereafter, Claimant maintains he sought treatment with Dr. Jackson who does perform acupuncture. Claimant contends Employer refused to authorize any change of choice in physician. Claimant argues he is entitled to his free choice of physician under Section 7(b) of the Act.

Finally, Claimant contends although he originally worked within his restrictions in the maintenance department, he has been put back to welding-type of work on modified duty which is outside his restrictions. Claimant argues he should be returned to the appropriate job of doing repairs on hand tools rather than the more strenuous work as a welder. Therefore, Claimant contends Employer has not provided him with suitable alternative employment.

Employer, on the other hand, contends Claimant's job is permanent, he was compensated for his time off from work and he was allowed to see the doctor with whom he wanted to treat. Specifically, Employer contends Claimant chose to draw vacation pay for the 9 days lost wages. Employer argues Claimant received full salary rather than compensation for these days and therefore no additional compensation is due to Claimant. In the alternative, if this Court determines Claimant was entitled to compensation benefits instead of vacation pay, Employer contends it is entitled to a credit for the vacation payments Claimant received.

Employer also contends Claimant's choice of physician was Dr. Azar who referred Claimant to Dr. Lowry. Employer agrees with Claimant that Dr. Lowry relocated, however contends Claimant's right to choose his physician was not withheld. Employer contends Claimant's choice of physician sent Claimant to Dr. Terry Smith after Dr. Lowry's relocation. Employer argues Dr. Azar, Claimant's choice of physician, agreed with the treatment by Dr. Smith and Claimant ratified his choice by continuing treatment with Dr. Smith for a prolonged period of time. Employer maintains Dr. Smith referred Claimant for treatment with Dr. Jackson, an acupuncturist and Claimant had some improvement from such treatment which was paid for by Employer.

Employer asserts it had a job analysis performed by Mr. Tommy Sanders, a vocational rehabilitation expert, who viewed Claimant's job requirements. Mr. Sanders concluded and Employer contends the work is within Claimant's restrictions and is thus suitable alternative employment.

## IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

### A. 17 Days of Missed Work

Claimant seeks to recover compensation for 17 days missed over the last two and one-half years. Claimant alleged he missed work on October 1, 9, 15, 2003, January 12, 2004 and March 22, 2004 due to doctor's appointments with Dr. Joe Jackson. Claimant also alleged treatment with Dr. Smith on July 23, 2003, November 5, 2003 and August 8, 2003. He did not receive workers' compensation, vacation pay, or sick leave for any of these days. Claimant also missed work without going to a doctor's appointment on October 22, 2003, July 6 and 12, 2004, May 4-5, 10, and 31, 2004, April 2, 2004 and August 3, 2004. Claimant received "vacation pay" for these days off. Claimant is seeking workers' compensation benefits for all 17 days.

Claimant applied for and received vacation pay for the nine days he missed without medical substantiation. The record does not support a medical visit or exam for the nine days Claimant missed work allegedly due to back pain. Claimant did not seek medical treatment or report to workers' compensation that he was unable to work because of an exacerbation of pain associated with his work-related injury. He chose to apply for and received vacation days off and vacation pay equivalent to 100% of his salary. Since there is no corroborative medical support for Claimant's absence from work, which was not reported to workers' compensation, I find and conclude the record does not support an award of disability compensation for the nine days in issue. Accordingly, Claimant's claim in this regard is **DENIED.**

As to the days Claimant missed with medical substantiation, Claimant did not recover vacation pay, sick leave or workers' compensation. Since Employer agreed in its post-trial brief that Claimant was entitled to workers' compensation benefits for six of the eight days, the undersigned must determine whether Claimant is entitled to workers' compensation for the July 23, 2003 and November 5, 2003, where Claimant has not provided an "off work" slip. The record clearly shows Claimant treated with Dr. Smith on July 23, 2003, after having a "little spell" and Employer actually sent Claimant home from work that day. There are no medical records supporting an award of disability compensation for November 5, 2003. Accordingly, I find and conclude that he is entitled to disability compensation for July 23, 2003, as well, but is not entitled to disability compensation for November 5, 2003. (EX-23, p. 36).

Therefore I find and conclude that Claimant is entitled to seven days of workers' compensation benefits. However, I further find and conclude that Claimant is not entitled to workers' compensation for the other ten days he missed from work because he has no medical substantiation for such absences being related to his work injury.

**B. Nature and Extent of Disability**

The parties stipulated that Claimant suffers from a compensable injury; however, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

## C. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job

opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

The nature and extent of disability and suitable alternative employment will be treated concurrently for purposes of explication.

In the present matter, Claimant was assigned permanent work restrictions from Dr. Smith limiting his lifting to 35 pounds occasionally; pushing and pulling to 45 pounds; occasional ladder climbing; and five minute breaks after sitting, standing, or walking for 30 minutes. There is no dispute that these restrictions prevent Claimant from performing the regular, unmodified duties of a welder. (EX-23, p. 31; CX-13, p. 4).

Based on his restrictions, Employer provided Claimant with a modified welding position where he is typically limited to flat welding, sweeping and welding collars. Claimant has worked continuously since March 12, 2002, and admits he is earning his regular wage and working his regular hours. Claimant has even received raises and currently earns $16.46 per hour, almost $2.00 more than prior to his injuries.

Although Claimant asserts his job is not suitable alternative employment and he is required to work outside of the

restrictions assigned by Dr. Smith, he has not submitted any medical documentation that the work is unsuitable or exceeds his restrictions. In fact, Dr. Smith and Dr. Jackson have reported Claimant's modified welding duties as a flat welder are within Claimant's restrictions. In addition, Claimant's choice of physician, Dr. Azar agreed with Dr. Smith's restrictions. All of his doctors are aware Claimant has returned to work and none of them have restricted Claimant from doing so. The only restriction placed on Claimant is that he should not weld on the field and should not go to welding school.

Claimant's supervisors have testified that they are aware of his restrictions and have assigned work to Claimant that comports with his restrictions.

Employer also sent vocational rehabilitation expert, Tommy Sanders, to Claimant's place of employment to evaluate Claimant's physical demand level as a welder. Mr. Sanders viewed demonstrations of Claimant's required welding assemblies and concluded Claimant was welding within his restrictions. Even though Mr. Sanders never discussed Claimant's duties with Claimant, Claimant's supervisors demonstrated exactly what was required of Claimant.

The only evidence that Claimant is working outside of his restriction is the testimony of Claimant himself. Although I generally find Claimant credible, based on the instant record, I am unable to find that Claimant is working outside of his restrictions. Claimant may have pain associated with welding, but there is no credible evidence that Claimant is working outside of his restrictions. Claimant has consistently worked in his modified capacity for long periods of time without complaint and without treating with physicians. Specifically, Claimant worked from March 2002 until November 2002 without complaints or medical treatment. On November 16, 2002, Claimant received medical treatment for back pain, but did not receive additional medical treatment until July 23, 2003. He has worked regularly and continuously since October 2003. The record does not support Claimant's allegation in his post-hearing brief that he works in excruciating pain and has engaged in extraordinary effort in doing so. In addition, Claimant admitted he is a good welder and performs good quantity and quality work.

Based on the medical and vocational evidence, Claimant's testimony and the testimony of Claimant's supervisors, I find and conclude that Claimant's modified job is suitable and reflects Claimant's post-injury wage earning capacity.

**D. Choice of Physician**

According to Section 7(b) of the Act, Claimant "shall have the right to choose an attending physician." 33 U.S.C. § 907(b). Claimant argues he is entitled to change physicians from Dr. Smith to Dr. Danielson or Dr. Schiavi, who are his choice of treating physicians. Employer does not dispute Claimant was originally referred to Dr. Hull by Employer's medical department and Dr. Hull referred Claimant to Dr. Smith.

After Claimant's second injury he chose Dr. Azar as his choice of physician. After Claimant completed physical therapy, Dr. Azar referred him to Dr. Lowry, a neurosurgeon. Claimant discontinued treatment with Dr. Lowry because the doctor relocated. Claimant contacted Dr. Azar for a referral to another neurosurgeon, Dr. Danielson. Employer refused to authorize the change in physician and subsequently arranged for Claimant to treat with Dr. Smith, a neurosurgeon.

After an initial choice of physician, a claimant may not change physicians without the prior written consent of the employer or carrier. 33 U.S.C. § 907(c)(2). An employer will consent to a change in physician where claimant's initial free choice was not of a specialist whose services are necessary for and appropriate to, the proper care and treatment of the compensable injury. Id. Consent for change of physician may be given upon a showing of good cause.

Employer contends Claimant selected Dr. Smith as his choice of physician, by his implicit acquiescence to continue treating with Dr. Smith and subsequent referrals for lumbar traction and acupuncture with Dr. Jackson, relying on 20 C.F.R. § 702.406(a) (2004). See Senegal v. Strachan Shipping Co., 21 BRBS 8 (1988); Hunt v. Newport News Shipbuilding and Dry Dock Co., 28 BRBS 364, 370-371 (1994).

Claimant attempted to change his choice of physician immediately upon being informed that his doctor relocated to Hattiesburg, Mississippi, but Employer refused, sending him back to Dr. Smith. It was only after he was refused authorization and after his claims adjuster scheduled an appointment with Dr. Smith, for a second evaluation, did Claimant return to Dr. Smith for treatment. Claimant never chose Dr. Smith as his physician, but was referred to Dr. Smith by his claims adjuster, after refusal to authorize a change in physician.

Employer argues Claimant continued to treat with Dr. Smith and therefore Dr. Smith should be Claimant's **de facto** choice of physician. I find Claimant's continued treatment with Dr.

Smith, has no consequence, since Claimant had no choice if he wanted ongoing medical treatment. Employer would only authorize Claimant to see Dr. Smith. If Claimant discontinued treatment with Dr. Smith, he would not have received any treatment for his injury.

Under the circumstances presented by the instant case, I find Claimant was not required to seek authorization to treat with Dr. Danielson to whom his treating physician referred him upon Dr. Lowry's relocation from the geographical area. Dr. Lowry was no longer available to treat Claimant. His treating physician, Dr. Azar and Dr. Lowry concluded he needed treatment by a specialist, i.e., a neurosurgeon. Claimant's continued treatment with Dr. Smith buttresses such a conclusion.

I find this scenario is analogous to Maguire v. Todd Pacific Shipyards Corp., 25 BRBS 299, 301-302 (1992), in which claimant's initial physician retired from practice and was no longer available to see claimant, but made arrangements for claimant to begin treatment with another physician. The Board agreed with the Administrative Law Judge that claimant was not required to obtain employer's consent to this change of physician. Furthermore, Dr. Azar, as Claimant's treating physician, may refer Claimant to a specialist for services which are necessary for the proper care and treatment of his compensable injury pursuant to 20 C.F.R. §702.406(a). He did so when he referred Claimant initially to Dr. Lowry.

I further find that Dr. Azar's referral of Claimant to Dr. Danielson, after the relocation of Dr. Lowry, did not require separate authorization from Employer. In the absence of evidence that the neurosurgery specialist was unnecessary, I find and conclude that Claimant is entitled to treat with his choice of physician.

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, an administrative law judge may accept a Claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaguemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972); Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999).

I find no reason to discredit Claimant regarding his choice of physician since his testimony was uncontradicted. His testimony was generally unequivocal and credible in this regard. He admitted he informed Employer on his job application that he

graduated from High School because he wanted to work for Employer, contrary to the record, but I find and conclude that the admission does not diminish his credibility regarding his choice of physician request. Although Claimant treated with Dr. Smith after his request for change of physician, Dr. Smith is not his choice of physician because Employer's medical department refused to authorize treatment with an alternative neurosurgeon. Therefore, I find his testimony as to his choice of physician request to be credible.

Accordingly, pursuant to the statutory requirements that Claimant is entitled to treatment by his choice of physician and Employer must furnish such medical treatment for such period as the nature of the injury or the process of recovery may require, I find Claimant is entitled to treatment with his choice of physician, Dr. Danielson or Dr. Schiavi.

## V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

## VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District

Director to submit an application for attorney's fees.[3] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant disability compensation for the following days: July 23, 2003, August 8, 2003, October 1, 9, and 15, 2003, January 12, 2004, and March 22, 2004, based on his average weekly wage of $629.63, in accordance with the provisions of Section 8 of the Act. 33 U.S.C. § 908.

2. Claimant's request for workers' compensation benefits for the following days: October 22, 2003, November 5, 2003, July 6 and 12, 2004, May 4, 5, 10, and 31, 2004, April 2, 2004, and August 3, 2004, lacked medical substantiation and is **DENIED.**

3. Claimant's request for change in choice of neurosurgeon is **GRANTED.**

4. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of

[3] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **February 9, 2004,** the date this matter was referred from the District Director.

Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

**ORDERED** this 2d day of March, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge